

79-143

Supreme Court, U. S.

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1978

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NO.

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FRANCISCO-MARTINEZ,  
Petitioner

VS.

THE UNITED STATES OF AMERICA  
Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. 78 - 5711

FRANCISCO MARTINEZ,  
Petitioner

VS.

THE UNITED STATES OF AMERICA,  
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

Petitioner, Francisco Martinez, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 21, 1979.

OPINION

The Decision of the United States Court of Appeals for the Fifth Circuit on original submission, by written opinion, affirmed an order of the Trial Court (A-1), finding that Sarita, Texas, is a functional equivalent of the border so as to allow a search without probable cause, but Appellant's nervousness nevertheless provided such cause.

QUESTIONS PRESENTED

I.

That the Immigration Checkpoint on U.S. 77 near Sarita,

Texas, cannot be a functional equivalent of the border, exempting Fourth Amendment protection against unreasonable searches and seizures.

## II.

That the stop, search and arrest of Petitioner did not occur at the immigration checkpoint and were not attended with reasonable suspicion.

### STATEMENT OF THE CASE

Petitioner was found guilty by the trial court of the offense of possession of marihuana with intent to distribute. 21 U.S.C. 841(a)(1). His written motion to suppress the evidence, predicated upon a warrantless search of his vehicle without probable cause or reasonable suspicion, was first overruled by the court.

Petitioner had been halted on U.S. Highway 77 when looking for a roadside park. The stop, not a checkpoint, was followed by a thorough search of his vehicle. The police activity was not attended by probable cause or reasonable suspicion, and was reasoned by the patrolman on his belief that the motorist may be attempting to evade the immigration checkpoint just ahead. The motorist was a U.S. Citizen of Mexican ancestry and clearly though nervously established his identity.

The Fifth Circuit Court of Appeals has agreed with the trial judge that the Sarita Checkpoint is a functional equivalent of the border, and the stop of Petitioner, though a mile away, occurred in the immediate vicinity so as not to require probable cause, reasonable suspicion, or any suspicion at all! The landmark decision of this Court in Almeida-

Sanchez only approved routine border searches at the point of entry or at established stations *near the border* located at strategic points on roads *coming from the border*. (93 S.Ct. 2535, at p. 2539). U.S. Highway 77 comes from the Rio Grande Valley, a metropolis with at least three designated SMSA's with thousands of American citizens and lawful residents.

### REASONS FOR GRANTING THE WRIT

Petitioner cannot believe that the stationary immigration checkpoint at Sarita is the "functional equivalent of the border" described by this Court in Almeida-Sanchez. This would enable the police to arbitrarily stop and search millions of tourists, citizen migrant-workers, and other legal residents at a location more than 60 miles into American soil, and subject them to unreasonable searches and seizures.

In this case, the motorist traveling away from the immigration checkpoint, displayed a common appearance of the elderly and of minorities. Nervousness, unaccompanied by reasonable suspicion should not give the police the pretext to a full search of his person and vehicle.

## CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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BY: \_\_\_\_\_  
L. Aron Pena

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon the Assistant United States Attorney, Federal Courthouse Building, Corpus Christi, Texas, by United States Mail on this the 19th day of July, 1979.

\_\_\_\_\_  
L. Aron Pena

## OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES of America,  
Plaintiff-Appellee,

v.

Francisco MARTINEZ,  
Defendant-Appellant.

No. 78-5711  
Summary Calendar.\*

United States Court of Appeals,  
Fifth Circuit

June 21, 1979.

Defendant was convicted in the United States District Court for the Southern District of Texas, Owen D. Cox, J., of possession of 293 pounds of marijuana with intent to distribute, and he appealed. The Court of Appeals held that: (1) border patrol officer lawfully stopped defendant's car and factual circumstances gave border patrol officer probable cause to search trunk of defendant's car; (2) presumption that judge as trier of fact relies only on properly admitted testimony was not rebutted, and (3) district court did not inject personal testimony in case against defendant.

Affirmed.

\*Rule 18, 5 Cir.: see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part 1.

## 1. Customs Duties 126

Because Sarita, Texas, is functional equivalent of border, probable cause to stop and search vehicles at checkpoint is not necessary.

## 2. Customs Duties 126

Where circumstances support officer's belief that motorist is trying to evade Sarita, Texas, checkpoint, stop which does not physically occur right at checkpoint is permissible since stop begins at checkpoint, although its accomplishment is delayed by suspect's running away.

## 3. Customs Duties 126

Border patrol officer had probable cause to search trunk of defendant's car where officer observed defendant drive to within 200 yards of Sarita, Texas, border patrol checkpoint and turn around and, when stopped by officer, defendant seemed very nervous.

## 4. Criminal Law 260.11(2)

Although prosecutor said something that may have been taken as statements of fact, presumption that judge as trier of fact relied only on properly admitted testimony was not rebutted in prosecution for possession of 293 pounds of marijuana with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. § 841(a)(1).

## 5. Criminal Law 656(1)

In prosecution for possession of 293 pounds of marijuana

with intent to distribute, district court did not inject personal testimony in case by commenting on geography of area in vicinity of Sarita, Texas, checkpoint since court had already taken judicial notice of checkpoint's characteristics. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. § 841(a)(1).

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Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

After a non-jury trial, in which his motion to suppress was denied, Francisco Martinez was found guilty of possession of 293 pounds of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). On appeal, Martinez contends that the District Court erred by: (1) concluding that the factual circumstances gave the Border Patrol Officer probable cause to search the trunk of the appellant's car; (2) concluding that the Border Patrol Officer lawfully stopped the appellant in his car; (3) receiving unsworn testimony from the prosecutor during the appellant's trial; and (4) injecting personal testimony in the case against the appellant. Finding no merit in the appellant's contentions, we affirm.

At approximately 1:45 A.M. on March 18, 1978, Border Patrol Officer Hill saw the appellant drive to within 200 yards of the Sarita, Texas, Border Patrol checkpoint and then turn around so as to travel southbound and not continue his northbound movement to the checkpoint. Officer Hill gave chase and stopped the appellant within a mile. The appellant

identified himself as an American citizen and stated that the reason he turned around was because he had just come up the road too far. Officer Hill noticed that the appellant seemed very nervous, and he asked the appellant to open the trunk of his car. The appellant said that he would rather not and would prefer to walk away. Officer Hill then asked him what was in the trunk, and the appellant replied, "I think you have a pretty good idea." Officer Hill opened the trunk and found 293 pounds of marijuana.

[1-3] Because Sarita is the functional equivalent of the border, probable cause to stop and search vehicles at the checkpoint is not necessary. *United States v. Bender*, 588 F.2d 200, 201 (5th Cir. 1979); *United States v. Clay*, 581 F.2d 1190, 1192-93 (5th Cir. 1978). Where, as here, the circumstances support the officer's belief that a motorist is trying to evade the checkpoint, a stop which does not physically occur right at the checkpoint is permissible since the stop begins at the checkpoint, although its accomplishment is delayed by the suspect's running away. *United States v. Torres*, 590 F.2d 156 (5th Cir. 1979); *United States v. Fontecha*, 576 F.2d 601 (5th Cir. 1978); *United States v. Macias*, 546 F.2d 58 (5th Cir. 1977). Officer Hill's prior suspicions were enhanced by the appellant's extreme nervousness and failure adequately to explain the abrupt U-turn. The appellant's responses to Officer Hill's inquiries concerning the contents of the trunk combined with the appellant's nervousness and attempted evasiveness yielded the probable cause necessary for the search of the trunk. *Id.* The determination of the District Court not to suppress the evidence was proper.

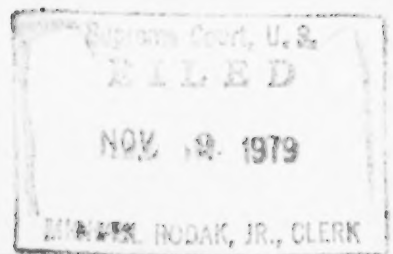
[4] The appellant next contends that the District Court erred by receiving into evidence unsworn testimony from the prosecutor. While it may be that the prosecutor said some things that may have been taken as statements of fact, the

District Court specified that it was not interested in hearing the facts from the attorneys. The presumption that the judge as trier of fact relied only on properly admitted testimony is not rebutted in this case. See *United States v. Schechter*, 475 F.2d 1099, 1101 n. 3 (5th Cir.), cert. denied, 414 U.S. 825, 94 S.Ct. 127, 38 L.Ed.2d 58 (1973); *United States v. Dillon*, 436 F.2d 1093, 1095 (5th Cir. 1971).

[5] The appellant's last contention is equally unfounded, for the District Court only observed that the question asked by defense counsel of Officer Hill had already been answered. Further, the District Court's comments regarding the geography of the area in the vicinity of the Sarita checkpoint were harmless, because the Court had already taken judicial notice of the checkpoint's characteristics.

AFFIRMED.

No. 79-143



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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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FRANCISCO MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1979**

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**No. 79-143**

**FRANCISCO MARTINEZ, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT***

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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Petitioner contends that the marijuana found in the trunk of his car near the Border Patrol checkpoint at Sarita, Texas, should have been suppressed because the checkpoint is not the functional equivalent of the border and the Border Patrol lacked probable cause to search the trunk.

1. Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, followed by a special parole term of three years. The court of appeals affirmed (Pet. App. A-1 to A-5; 597 F. 2d 509).

The evidence showed that on March 18, 1978, at approximately 1:45 a.m., petitioner drove his car northbound to within 200 yards of the permanent alien checkpoint 14 miles south of Sarita, Texas (Tr. 6). There, petitioner turned his vehicle around and drove away from the checkpoint (Tr. 8). Border Patrol Officer Hill, who observed petitioner's actions, gave chase and stopped petitioner within a mile (Tr. 8, 11-12). Petitioner, who appeared very nervous, told the officer that he had turned around because he noticed that he had driven too far up the road (Tr. 9, 12-13). Officer Hill asked petitioner to open the trunk of his automobile and petitioner refused. Officer Hill then asked what the trunk contained and petitioner stated, "I think you have a pretty good idea." Officer Hill opened the trunk and discovered 293 pounds of marijuana (Tr. 10).

2. Petitioner contends (Pet. 2-3) that the Sarita checkpoint is not the functional equivalent of the border and that therefore the Border Patrol officer could not legally search his car in the absence of probable cause.

The same issue is presented in *Abrams v. United States*, 598 F. 2d 969 (5th Cir. 1979), petition for cert. pending, No. 79-5216, and we rely on our brief in opposition in that case to demonstrate why the court of appeals' decision regarding the characteristics of the Sarita checkpoint does not merit review by this Court.<sup>1</sup>

3. In any event, even if Sarita is not the functional equivalent of the border, the stop and search of petitioner's car were proper. Sarita is a permanent checkpoint, and initial stops at such places are permissible even "in the absence of any individualized suspicion."

<sup>1</sup>A copy of the brief in opposition in *Abrams* has been sent to petitioner.

*United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976). When petitioner stopped his car and turned it around a short distance before the checkpoint, the Border Patrol officer had good reason to pursue the vehicle and stop it. The further events that then transpired established the probable cause necessary to justify a vehicle search at a checkpoint that is not the functional equivalent of the border. See *United States v. Ortiz*, 422 U.S. 891 (1975).

Petitioner's U-turn suggested an attempt to evade an encounter with the Border Patrol. His proffered explanation for the maneuver—that he had simply driven too far up the road—was implausible in light of the fact that Highway 77 does not intersect any other road for a distance of approximately 50 miles south of Sarita. In addition, petitioner responded to Officer Hill's questioning about the contents of the car's trunk by stating that he thought the officer had "a pretty good idea" what the trunk contained. Considering these remarks as well as petitioner's nervous appearance, Officer Hill had substantial reason to believe, based on his experience as a Border Patrol agent, that petitioner was attempting to smuggle aliens or contraband into the United States. The court of appeals correctly found that the officer had probable cause to search petitioner's automobile, and this Court should not review that essentially factual conclusion. See *United States v. Fontecha*, 576 F. 2d 601 (5th Cir. 1978) (attempt to evade checkpoint and odor of marijuana provide probable cause); *United States v. Macias*, 546 F. 2d 58 (5th Cir. 1977) (U-turn at checkpoint plus heavily-loaded appearance of vehicle established probable cause); *United States v. Medina*, 543 F. 2d 553 (5th Cir. 1976) (probable cause established by defendant's failure to stop at checkpoint and denial of possession of key to trunk, plus odor of air freshener in car).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

NOVEMBER 1979